

TAMERA S. BATES,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) on January 15, 2005, alleging onset as of December 9,

- 1 -

1 2004 (Tr. 77-79, 132). The application was denied initially and on
2 reconsideration (Tr. 45-48, 51-52). Administrative Law Judge (ALJ)
3 Paul L. Gaughen held a hearing on May 23, 2007 (Tr. 594-635).
4 Plaintiff, represented by counsel, psychologist Ronald Klein, Ph.
5 D., and vocational expert K. Diana Kramer testified. On August 21,
6 2007, the ALJ issued a decision finding plaintiff disabled when
7 drug or alcohol abuse (DAA) is included. He found when DAA is
8 excluded, plaintiff suffers only mild limitations. The ALJ found
9 DAA is a factor materially contributing to plaintiff's disability
10 determination. Accordingly, plaintiff is not disabled (Tr. 18-39).
11 The Appeals Council admitted additional evidence but denied
12 plaintiff's request for review (Tr. 6-9). Therefore, the ALJ's
13 decision became the final decision of the Commissioner, which is
14 appealable to the district court pursuant to 42 U.S.C. § 405(g).
15 Plaintiff filed this action for judicial review pursuant to 42
16 U.S.C. § 405(g) on May 20, 2009 (Ct. Rec. 2, 4).

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing
19 transcript, the ALJ's decision, the briefs of the parties, and
20 will only be summarized here as necessary.

21 Plaintiff was 44 years old at the hearing. She completed
22 tenth grade, earned a GED, and competed two years of college in a
23 paralegal study program at a technical school (Tr. 240, 611, 622).
24 Plaintiff has worked as a bookkeeper, cook, payroll clerk,
25 material handler, and telemarketer (Tr. 611, 622-624). She alleges
26 disability as of December 9, 2004, due to cervical radiculopathy,
27 spinal arthritis, knee pain, and mental impairments. She alleges
28 her impairments are severe when DAA is excluded.

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed
2 impairments acknowledged by the Commissioner to be so severe as to
3 preclude substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
5 App. 1. If the impairment meets or equals one of the listed
6 impairments, plaintiff is conclusively presumed to be disabled.
7 If the impairment is not one conclusively presumed to be
8 disabling, the evaluation proceeds to the fourth step, which
9 determines whether the impairment prevents plaintiff from
10 performing work which was performed in the past. If a plaintiff is
11 able to perform previous work, that Plaintiff is deemed not
12 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
13 this step, plaintiff's residual functional capacity ("RFC")
14 assessment is considered. If plaintiff cannot perform this work,
15 the fifth and final step in the process determines whether
16 plaintiff is able to perform other work in the national economy in
17 view of plaintiff's residual functional capacity, age, education
18 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
19 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish
21 a *prima facie* case of entitlement to disability benefits.
22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
23 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
24 met once plaintiff establishes that a physical or mental
25 impairment prevents the performance of previous work. The burden
26 then shifts, at step five, to the Commissioner to show that (1)
27 plaintiff can perform other substantial gainful activity and (2) a
28 "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
2 Cir. 1984).

3 Plaintiff has the burden of showing that drug and alcohol
4 addiction (DAA) is not a contributing factor material to
5 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9th Cir. 2001).
6 The Social Security Act bars payment of benefits when drug
7 addiction and/or alcoholism is a contributing factor material to a
8 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
9 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9th Cir. 1998). If there
10 is evidence of DAA and the individual succeeds in proving
11 disability, the Commissioner must determine whether the DAA is
12 material to the determination of disability. 20 C.F.R. §§ 404.1535
13 and 416.935. If an ALJ finds that the claimant is not disabled,
14 then the claimant is not entitled to benefits and there is no need
15 to proceed with the analysis to determine whether substance abuse
16 is a contributing factor material to disability. However, if the
17 ALJ finds that the claimant is disabled, then the ALJ must proceed
18 to determine if the claimant would be disabled if he or she
19 stopped using alcohol or drugs.

20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
23 the Commissioner's decision, made through an ALJ, when the
24 determination is not based on legal error and is supported by
25 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
26 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
27 "The [Commissioner's] determination that a plaintiff is not
28 disabled will be upheld if the findings of fact are supported by

1 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
2 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
3 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
4 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
7 573, 576 (9th Cir. 1988). Substantial evidence "means such
8 evidence as a reasonable mind might accept as adequate to support
9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
10 (citations omitted). "[S]uch inferences and conclusions as the
11 [Commissioner] may reasonably draw from the evidence" will also be
12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
13 review, the Court considers the record as a whole, not just the
14 evidence supporting the decision of the Commissioner. *Weetman v.*
15 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
16 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

17 It is the role of the trier of fact, not this Court, to
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
19 evidence supports more than one rational interpretation, the Court
20 may not substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
22 (9th Cir. 1984). Nevertheless, a decision supported by substantial
23 evidence will still be set aside if the proper legal standards
24 were not applied in weighing the evidence and making the decision.
25 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
26 433 (9th Cir. 1987). Thus, if there is substantial evidence to
27 support the administrative findings, or if there is conflicting
28 evidence that will support a finding of either disability or

1 nondisability, the finding of the Commissioner is conclusive.
2 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

3 **ALJ'S FINDINGS**

4 At step one the ALJ found although plaintiff worked in 2005
5 and 2006, she has not engaged in substantial gainful activity
6 since she protectively applied for benefits on January 15, 2005
7 (Tr. 23). At step two the ALJ found plaintiff suffers from the
8 severe impairments of depression and DAA (Tr. 23). At step three
9 ALJ Gaughen found plaintiff's impairments meet two of the Listed
10 impairments, mood disorder (12.04) and substance abuse disorder
11 (12.09)(Tr. 33). Because plaintiff's disorders meet the Listings,
12 she is presumed unable to work. The ALJ found plaintiff disabled.

13 The ALJ then considered, pursuant to *Bustamante v.*
14 *Massanari*,¹ if plaintiff would be disabled if she stopped abusing
15 substances. At the second step two he found if DAA is excluded,
16 plaintiff's impairments would minimally affect her ability to
17 perform basic work activities (Tr. 34). Because the ALJ found
18 plaintiff disabled when DAA is included, and able to work when
19 substance free, DAA materially contributes to the disability
20 determination. Accordingly, the ALJ found plaintiff is not
21 disabled as defined by the Social Security Act (Tr. 39).

22 **ISSUES**

23 Plaintiff alleges the Commissioner erred as a matter of law
24 by failing to properly weigh the evidence of mental and physical
25 impairment, including new evidence admitted by the Appeals Council
26 but not seen by the ALJ (Ct. Rec. 23 at 16-25). The Commissioner
27

28 ¹262 F.3d 949, 954 (9th Cir. 2001).

1 responds the ALJ appropriately weighed the evidence of
2 psychological and physical impairment, and properly found DAA
3 material (Ct. Rec. 33 at 7-20). With respect to the new evidence,
4 the Commissioner asserts the court lacks jurisdiction to consider
5 the Appeals Council's decision to deny review and asks the Court
6 to affirm (Ct. Rec. 33 at 20-26).

7 DISCUSSION

8 A. Weighing medical evidence

9 In social security proceedings, the claimant must prove the
10 existence of a physical or mental impairment by providing medical
11 evidence consisting of signs, symptoms, and laboratory findings;
12 the claimant's own statement of symptoms alone will not suffice.
13 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
14 on the basis of a medically determinable impairment which can be
15 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
16 medical evidence of an underlying impairment has been shown,
17 medical findings are not required to support the alleged severity
18 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
19 1991).

20 A treating physician's opinion is given special weight
21 because of familiarity with the claimant and the claimant's
22 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
23 1989). However, the treating physician's opinion is not
24 "necessarily conclusive as to either a physical condition or the
25 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
26 751 (9th Cir. 1989)(citations omitted). More weight is given to a
27 treating physician than an examining physician. *Lester v. Chater*,
28 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is

1 given to the opinions of treating and examining physicians than to
2 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
3 (9th Cir. 2004). If the treating or examining physician's opinions
4 are not contradicted, they can be rejected only with clear and
5 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
6 ALJ may reject an opinion if he states specific, legitimate
7 reasons that are supported by substantial evidence. See *Flaten v.*
8 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
9 1995).

10 In addition to the testimony of a nonexamining medical
11 advisor, the ALJ must have other evidence to support a decision to
12 reject the opinion of a treating physician, such as laboratory
13 test results, contrary reports from examining physicians, and
14 testimony from the claimant that was inconsistent with the
15 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
16 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1035, 1042-43
17 (9th Cir. 1995).

18 **B. Psychological limitation**

19 Plaintiff contends that the ALJ failed to properly weigh the
20 evidence of psychological limitation, including the opinions of
21 (1) treating professional John Billings, MS, ARNP (2005, 2007 at
22 Tr. 282, 490); (2) examining professionals Sheri Hoveskeland, MS,
23 CDP (2/22/05 at Tr. 220-222); Frank Rosenkrans, Ph.D. (3/7/05 at
24 Tr. 232-239) and (8/22/05 at Tr. 546-553); John Severinghaus,
25 Ph.D. (3/28/05 at Tr. 240-242); (3) consulting psychologist John
26 McRae, Ph.D. (5/1/05 at Tr. 243-259).

27 Plaintiff alleges evidence unavailable to the ALJ but
28 considered by the Appeals Council supports her claim. She relies

1 on the opinions of examining psychologists Mahlon Dalley, Ph.D.
2 (9/17/07 at Tr. 556-570) and Kayleen Islam-Zwart, Ph.D. (4/19/08
3 at Tr. 579-586)(Ct. Rec. 23 at 19). Ms. Bates apparently alleges
4 the Appeals Council erred by finding the evidence cumulative and
5 denying review. The new evidence of psychological and physical
6 limitation is discussed at (D), below.

7 The Commissioner responds the ALJ properly relied on the
8 opinion of the testifying psychologist and other evidence when he
9 found DAA material to the disability determination (Ct. Rec. 33 at
10 7-17).

11 *Treating professional*

12 Mr. Billings, MS, ARNP, began treating plaintiff in April
13 2005² (Tr. 282). In 2007 he opined Ms. Bates' post-traumatic
14 stress disorder (PTSD) with depression and panic "incapacitated"
15 her to the point she was unable to obtain gainful employment. He
16 supported her application for benefits (Tr. 490). Although the
17 letter is undated it appears it was written in 2007 (Tr. 633-634).

18 The ALJ gave several specific, legitimate reasons for
19 rejecting the nurse practitioner's contradicted opinion. Perhaps
20 most importantly, Mr. Billings fails to mention DAA (Tr. 38, 65).
21 This is significant because plaintiff tested positive for cocaine,
22 methadone, morphine, and oxycodone in October 2006, apparently
23 unbeknownst to Mr. Billings (Tr. 31, referring to Exhibit 27F).
24 The ALJ's additional reasons include the brief, cursory nature of
25 the opinion, and it is unsupported by clinical or other
26 substantive evidence (Tr. 38, referring to opinion at 490). The

27
28 ²Plaintiff described her treatment with Mr. Billings as 20
minute medication management appointments (Tr. 129).

1 ALJ is correct. Mr. Billings diagnosed PTSD, but examining
2 psychologist Dr. Severinghaus notes plaintiff's reported a single
3 symptom of PTSD, nightmares. Plaintiff's treating doctors have
4 opined she is capable of work (Exhibit 24F). The ALJ's reasons are
5 specific and legitimate. See *Batson v. Comm'r of Soc. Sec. Admin.*,
6 359 F.3d 1190, 1195 (9th Cir. 2004)("[A]n ALJ may discredit
7 treating physicians' opinions that are conclusory, brief, and
8 unsupported by the record as a whole, or by objective medical
9 findings ...")(internal citations omitted); *Bunnell v. Sullivan*,
10 947 F.2d 341, 345 (9th Cir. 1991)(en banc).

11 When he weighed the conflicting opinions, the ALJ properly
12 considered plaintiff's credibility (Tr. 36). Credibility
13 determinations bear on evaluations of medical evidence when an ALJ
14 is presented with conflicting medical opinions or inconsistency
15 between a claimant's subjective complaints and diagnosed
16 conditions. See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.
17 2008).

18 It is the province of the ALJ to make credibility
19 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
20 1995). However, the ALJ's findings must be supported by specific
21 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
22 1990). Once the claimant produces medical evidence of an
23 underlying medical impairment, the ALJ may not discredit testimony
24 as to the severity of an impairment because it is unsupported by
25 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
26 1998). Absent affirmative evidence of malingering, the ALJ's
27 reasons for rejecting the claimant's testimony must be "clear and
28 convincing." *Lester v. Chater*, F.3d 821, 834 (9th Cir. 1995).

1 "General findings are insufficient: rather the ALJ must identify
2 what testimony is not credible and what evidence undermines the
3 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
4 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

5 The ALJ found Ms. Bates less than fully credible for clear
6 and convincing reasons, including but not limited to inconsistent
7 statements, drug seeking behavior, and statements inconsistent
8 with observed behavior (Tr. 36). Another reason not explicitly
9 cited by the ALJ also supports his assessment: plaintiff's
10 activities are inconsistent with claimed limitations.

11 The ALJ notes plaintiff testified she can lift 5-10 pounds,
12 walk less than a block, and stopped using drugs in 2000. Ms. Bates
13 told examiners, however, she has no difficulty performing daily
14 chores, has excellent health, and quit using drugs in 2001 (Tr.
15 36, 240-241, 614, 618). ER personnel and plaintiff's treatment
16 providers document drug seeking behavior on many occasions, as the
17 ALJ observes (Tr. 32, 36, see e.g., Tr. 201-204, 227, 305-306,
18 323, 329, 347, 365, 402, 409, 470). ALJ Gaughen notes at the ER
19 plaintiff complained of chest pain. She described the severity as
20 8 or 9 out of 10. On the same occasion, the ALJ notes she was seen
21 giggling and visiting with friends in no apparent distress (Tr.
22 24, Exhibit 1F, Tr. 162).

23 While alleging severe limitations during the relevant period,
24 plaintiff fell off a "four wheeler," cared for an infant, "rough
25 housed" with her grandchildren, hurt her neck after "heavy
26 lifting" at home, hurt her back on another occasion in November
27 2005 after moving two households of furniture, and had a job
28 interview in July 2007 (Tr. 27-28, 32, 292, 362, Exhibits 16F,

1 20F/13, 28F/1).

2 Inconsistent statements and drug seeking behavior are
3 specific, clear and convincing reasons to discredit subjective
4 complaints. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
5 2002); *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir.
6 2001)(holding the likelihood claimant was exaggerating complaints
7 of physical pain to "feed his Valium addiction" supported the
8 ALJ's decision to reject his testimony). If a claimant is able to
9 spend a substantial part of the day engaged in pursuits involving
10 the performance of physical functions that are transferrable to a
11 work setting, a specific finding as to this fact may be sufficient
12 to discredit a claimant's allegations. *Morgan v. Comm'r of Soc.*
13 *Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999); *Fair v. Bowen*, 885
14 F.2d 597, 603 (9th Cir. 1989).

15 The ALJ's credibility assessment is supported by clear and
16 convincing reasons and they are supported by substantial evidence.
17 *Examining mental health professionals*

18 Plaintiff's probation officer referred Ms. Bates for a mental
19 health assessment in February 2005, a month after onset (Tr. 220-
20 222). The ALJ considered the opinion of Ms. Hoveskeland, who
21 performed the assessment (Tr. 38, referring to Exhibit 5F):

22 Ms. Hoveskeland reported at Exhibit 5F that
23 the claimant was unable to work due to
24 experiencing several medical and mental health
25 issues. However, Ms. Hoveskeland also reported
26 she [plaintiff] could not be considered in full
27 sustained remission from polysubstance dependence
28 and treatment to address her ongoing chemical
dependency issues was recommended.

(Tr. 38).

Ongoing DAA issues included plaintiff's xanax overdose and
ongoing use of narcotic pain medication (Tr. 26, 220, 222).

1 The ALJ properly discounted Ms. Hoveskeland's opinion because
2 it does not address plaintiff's functioning without DAA, the ALJ's
3 relevant inquiry after he found her disabled when DAA is included.
4 This reason is specific, legitimate and supported by substantial
5 evidence.

6 Dr. Rosenkrans evaluated plaintiff twice in 2005, in March³
7 and August (Tr. 232-239, 546-553). As noted by the ALJ and Dr.
8 Klein, plaintiff's March 2005 MMPI-2 scores were invalid due to
9 rather extreme over-reported symptoms (Tr. 26, 33, 238). Dr.
10 Rosenkrans diagnosed polysubstance dependence; major depressive
11 disorder, recurrent, moderate; and borderline personality disorder
12 (Tr. 233). He opined "drug use/withdrawal can exacerbate
13 depression and mood swings"; assessed marked and moderate
14 limitations expected to last at most six months, and opined with
15 mental health and drug treatment plaintiff would likely be able to
16 work. He observes plaintiff received no past or current mental
17 health services and did not take medication (Tr. 234-236).

18 The ALJ's reason for rejecting the assessed limitations is
19 specific and legitimate - the opinion fails to address plaintiff's
20 limitations when DAA is excluded, the relevant inquiry after
21 finding plaintiff disabled. The ALJ accepts Dr. Rosenkrans'
22 opinion DAA could exacerbate depression and mood swings (Tr. 38).
23 Plaintiff's invalid MMPI-2 score indicative of symptom
24 exaggeration is another specific, legitimate reason the ALJ
25 rejected this opinion.

27 ³Shannon Schoonover, MS, evaluated plaintiff on March 7,
28 2005, for public assistance benefits, and Dr. Rosenkrans
endorsed her findings (Tr. 26, 239).

1 In August 2005 Dr. Rosenkrans⁴ (Tr. 545-553) notes plaintiff
2 inconsistently reports her past substance use (Tr. 547). He
3 assessed a GAF of 68, indicating mild limitations (Tr. 552). This
4 is consistent with the ALJ finding plaintiff's mental limitations
5 are mild when she is substance-free.

6 Dr. Severinghaus evaluated Ms. Bates on March 28, 2005,
7 noting he received the wrong medical records (Tr. 240-242). The
8 ALJ rejected his opinion as based primarily on plaintiff's
9 unreliable self report, given the noted absence of accurate
10 records (Tr. 26, 38). ALJ Gaughen found Dr. Klein's opinion was
11 entitled to more weight than Dr. Severinghaus's because Dr. Klein
12 had the ability to review all of plaintiff's records. The records
13 include the report of treating doctor Mariah Schimpf, M.D., who
14 notes in March 2005 plaintiff admitted her suicide attempts
15 occurred when she was using drugs (Tr. 313). The ALJ's reasons for
16 giving less credit to the examiner's opinion are specific,
17 legitimate reasons supported by substantial evidence. Plaintiff is
18 incorrect the ALJ relied solely on Dr. Klein's testimony.

19 *Consulting psychologist*

20 Plaintiff alleges the ALJ failed to properly weigh the
21 opinion of agency psychologist Dr. McRae in May 2005, four months
22 after onset on the filing date of January 15, 2005 (Tr. 243-
23 259)(Ct. Rec. 23 at 19). The ALJ observes while Dr. McRae's and
24 other agency opinions tend to support his findings, additional
25 evidence was received after their opinions, including Dr. Klein's
26 testimony. The ALJ correctly observes the additional evidence

27
28 ⁴Dr. Rosenkrans adopted the findings of Kathy Jamieson-
Turner, MS (Tr. 553).

1 necessitates a new determination (Tr. 39). The ALJ properly
2 weighed the agency reviewing psychologists' opinions.

3 The post-decision evidence of psychological impairment is
4 addressed at (D) below.

5 **C. Physical limitations**

6 Plaintiff alleges the ALJ should have found she suffers from
7 severe physical limitations when DAA is excluded (Ct. Rec. 23 at
8 14). She relies on the June 2006 opinion of treatment provider
9 Barbara Tritt, PAC (Tr. 421). [She also relies on the post-
10 decision opinions of William Shanks, M.D. (September 4, 2007 at
11 Tr. 535) and Paul Osmun, M.D. (September 14, 2007 at Tr. 573),
12 discussed at (D), below.]

13 In February 2006 Ms. Bates denies street drug use (Tr. 442).
14 A month later plaintiff tells Ms. Tritt she "has no street drug
15 history" (Tr. 441). This is three months before Ms. Tritt's
16 opinion on which plaintiff relies.

17 The ALJ gave several reasons for rejecting Ms. Tritt's
18 opinion limiting plaintiff to sedentary work (Tr. 38): (1) her
19 findings are not based on standardized testing; (2) her opinion
20 appears based on plaintiff's unreliable self-report; (3) Ms. Tritt
21 is not a "treating source" as defined by applicable regulations
22 because as a PAC she is not an acceptable medical source; (4) no
23 underlying impairment supports physical restrictions, and (5) Ms.
24 Tritt's findings are inconsistent with other examinations, and
25 with more detailed reports (Tr. 38, citing Exhibits 3F, 6F, 20-
26 22F, 26F, and examinations within 27F).

27 The ALJ is correct physicians' assistants are not acceptable
28 sources. Acceptable medical sources, as defined by the applicable

1 regulations, do not include physician's assistants. See C.F.R.
2 404.1527(a)(2); SSR 06-03p.

3 The ALJ's additional reasons for rejecting Ms. Tritt's
4 contradicted opinion are specific, legitimate and supported by the
5 evidence. The ALJ was not required to credit Ms. Tritt's
6 contradicted opinion to the extent it is based on plaintiff's
7 unreliable self-report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216
8 (9th Cir. 2005)(an ALJ is not required to credit opinions based on
9 plaintiff's unreliable self reporting).

10 Moreover, on May 16, 2006, just before Ms. Tritt gave her
11 opinion, plaintiff tested positive for non-prescribed methadone
12 (Tr. 475), suggesting Ms. Tritt's opinion includes rather than
13 excludes the effects of DAA. In December 2006, Ms. Tritt notes
14 plaintiff has again violated her pain contract. On October 5,
15 2006, Ms. Bates tested positive for methadone, cocaine and
16 oxycodone, none of which were prescribed (Tr. 475).

17 The ALJ is correct Ms. Tritt's findings are inconsistent with
18 other examinations and more detailed reports. He relied on the
19 more specific opinions of plaintiff's treating doctor, orthopedist
20 Andrew Howlett, M.D., who in May 2006 opined plaintiff was capable
21 of working in a desk-type job and had no permanent disability (Tr.
22 30, referring to Exhibit 24F). In October 2006 Dr. Howlett
23 surgically repaired a partial anterior cruciate ligament tear and
24 a medial meniscus tear in plaintiff's left knee (Tr. 341-342). Two
25 weeks later Dr. Howlett told the ER plaintiff should not be given
26 narcotic pain medication "under any circumstance," and plaintiff
27 left the ER before the doctor returned with the x-ray report (Tr.
28 347). Two months after arthroscopic surgery plaintiff reported she

1 strained her neck after falling. She was able to walk and reported
2 no other problems (Tr. 375). In January 2007, Dr. Howlett released
3 plaintiff for desk or other light duty work (Tr. 401).

4 The ALJ properly found plaintiff's knee problems did not meet
5 the 12 month durational requirement (Tr. 38). Plaintiff was
6 scheduled for a hysterectomy when she applied for benefits.
7 Records show two months after this surgery, she was doing very
8 well (Tr. 229, 4/14/05). Any impairment did not last 12 months.

9 Objective tests showed other alleged physical impairments,
10 including DDD, are mild. See e.g.: Dr. Howlett notes in March 2007
11 plaintiff walks without limping and quad strength is 5/5. Tests in
12 August 2006 show mild DDD in the lower thoracic and lumbar spine.
13 Also in August 2006, Ms. Tritt tells plaintiff to walk ten minutes
14 each hour and work up walking to 40 minutes daily. In July 2006
15 tests show no more than mild foraminal and canal stenosis of the
16 cervical spine. On January 30, 2006, tests show no evidence of
17 radiculopathy (Tr. 15, 31, 359, 401-402, 414-418, 463, 476-477,
18 Exhibit 24F/5). The ALJ observes plaintiff was diagnosed with
19 hepatitis C in 1997 but liver function studies have been within
20 normal limits (Tr. 38, 313).

21 The ALJ considered plaintiff's credibility when he weighed
22 the evidence of physical impairment. He points out many of
23 plaintiff's exertional activities are inconsistent with the severe
24 physical limitations alleged. Plaintiff fails to meet her burden
25 of establishing she suffers from any severe physical impairment.

26 **D. New evidence admitted by the Appeals Council**

27 Plaintiff alleges the September 2007 and April 2008 reports
28 (by Drs. Dalley and Zwart, respectively) support her claimed

1 mental limitations, and the September 2007 and April 2008 opinions
2 of Drs. Osmun and Shanks, respectively, support her severe
3 physical impairments.

4 All four of these opinions were rendered after the ALJ's
5 decision on 8/21/07. The Appeals Council found the new evidence
6 cumulative (Tr. 7). The Commissioner asserts the Court lacks
7 jurisdiction to consider the evidence because this not a sentence
8 six remand (Ct. Rec. 33 at 20; 42 U.S.C. § 405(g)). Citing *Ramirez*
9 *v. Shalala*, 8 F.3d 1449, 1451-1452 (9th Cir. 1993), the
10 Commissioner acknowledges the reviewing Court may consider new
11 evidence submitted to the Appeals Council in determining whether
12 the ALJ's decision is supported by substantial evidence (Ct. Rec.
13 33 at 22).

14 The new evidence clearly supports the ALJ's decision.
15 Interestingly, plaintiff's physical therapist reports in June and
16 July 2007: (1) Ms. Bates cleaned the floor on her hands and knees;
17 (2) left therapy early to take her grandson to the doctor or pick
18 him up; (3) had increased soreness after caring for her grandson
19 for several days; (4) arrived 15 minutes late to an appointment
20 and was unable to exercise because preoccupied with her grandson,
21 who she brought to the appointment, and (5) had a job interview on
22 July 24, 2007 (Tr. 508-509, 511, 515). The evidence is similar to
23 that considered by the ALJ and is additional evidence supporting
24 his determination.

25 After-the-fact psychiatric diagnoses are notoriously
26 unreliable. See *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir.
27 1984). The ALJ issued his unfavorable decision August 21, 2007
28

1 (Tr. 21-39). A month later Dr. Dalley⁵ gave his opinion (Tr. 556-
2 570). Although he saw track marks on plaintiff's arms, she denied
3 using any illicit drugs since 1991 (Tr. 561). He assessed opioid
4 dependence, among other disorders, recommended a chemical
5 dependency evaluation, and assessed a GAF of 65 (Tr. 564-565).
6 This is consistent with the ALJ's findings.

7 Eight months after ALJ Gaughen's decision, Dr. Zwart
8 evaluated plaintiff. She assessed marked and moderate limitations
9 but opined there is no indication of drug use (Tr. 579-586).

10 Similarly, Drs. Shanks and Osmun examined Ms. Bates and
11 assessed her condition after the ALJ's unfavorable decision. Dr.
12 Shanks examined plaintiff in April 2008, eight months after the
13 ALJ's decision (Tr. 532-536). He assessed an RFC for sedentary
14 work and did not recommend further treatment (Tr. 535). A month
15 after the ALJ's decision, Dr. Osmun assessed an RFC for sedentary
16 work and opined plaintiff's ability to sit, stand, walk, and lift
17 significantly interfere with the ability to work (Tr. 573). He
18 states plaintiff stopped using drugs in 1997 (Tr. 572)

19 Additionally, George W. Bagby, M.D., examined plaintiff May
20 7, 2008. He opined she was capable of light work and her
21 "motivation at this time is in question" (Tr. 544).

22 New evidence is considered material if it creates a
23 reasonable possibility of changing the outcome and if it bears
24 directly and substantially on the matter. *Mayes v. Massansri*, 276
25 F.3d 453, 462 (9th Cir. 2001)(additional citations omitted). The
26 Court may remand for further proceedings to consider the new

28 ⁵The evaluation was performed by Brooke Sjostrom, MS, LMHC,
and adopted by Dr. Dalley.
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FOR SUMMARY JUDGMENT

1 evidence if the claimant shows good cause for failing to produce
2 the evidence earlier. *Mayes*, 276 F.3d at 462-463. A claimant does
3 not meet the good cause requirement by merely obtaining a more
4 favorable report once his or her claim has been denied. To show
5 good cause, the claimant must demonstrate that the new evidence
6 was unavailable earlier. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th
7 Cir. 1985)

8 Plaintiff fails to show good cause why these opinions could
9 not have been obtained and presented to the ALJ for his
10 consideration. See *Clem v. Sullivan*, 894 F.2d 328, 332 (9th Cir.
11 1990)(the claimant must establish good cause for not having sought
12 the expert's opinion earlier). In the event plaintiff feels new
13 evidence supports a new application, she can again apply for
14 benefits.

15 The ALJ is responsible for reviewing the evidence and
16 resolving conflicts or ambiguities in testimony. *Magallanes v.*
17 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
18 trier of fact, not this court, to resolve conflicts in evidence.
19 *Richardson*, 402 U.S. at 400. The Court has a limited role in
20 determining whether the ALJ's decision is supported by substantial
21 evidence and may not substitute its own judgment for that of the
22 ALJ, even if it might justifiably have reached a different result
23 upon de novo review. 42 U.S.C. § 405 (g).

24 The ALJ's credibility assessment is supported by clear and
25 convincing reasons. He properly weighed the evidence of
26 psychological and physical limitations, and of the effects of DAA.
27 His second step two finding that plaintiff's depression is non-
28 severe (i.e., causes no more than a slight abnormality minimally

1 effecting her ability to work) when DAA is excluded is fully
2 supported by the medical and other evidence. See 20 C.F.R. §§
3 404.1521 and 416.921.

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this
6 court finds that the ALJ's decision is free of legal error and
7 supported by substantial evidence..

8 **IT IS ORDERED:**

9 1. Defendant's motion for summary judgment (**Ct. Rec. 32**) is
10 **GRANTED.**

11 2. Plaintiff's motion for summary judgment (**Ct. Rec. 22**) is
12 **DENIED.**

13 The District Court Executive is directed to file this Order,
14 provide copies to counsel for the parties, enter judgment in favor
15 of Defendant, and **CLOSE** the file.

16 DATED this 29th day of September, 2010.

17 s/ James P. Hutton

18 JAMES P. HUTTON
19 UNITED STATES MAGISTRATE JUDGE
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